Supreme Court, U.S.
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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONNA PATTERSON and NICHOLAS BROWN,
Petitioners,
v.

P.H.P. HEALTHCARE CORPORATION
and MARK KENNEDY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether preponderant evidence of actual emotional injury is sufficient to support an award of compensatory damages under the civil rights laws, with or without corroboration of the victim's testimony or proof of physical manifestations of harm.

2. Whether proof of a supervisor's or manager's malicious conduct is sufficient to support an award of punitive damages against a corporation under 42 U.S.C. §§ 1981 and 1981a, with or without evidence of corporate officers' complicity.

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Donna Patterson and Nicholas Brown hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A at 1a-34a) is reported at 90 F.3d 927. The opinion of the district court (App. B at 35a-43a) is unreported.

JURISDICTION

The court of appeals issued its decision on July 25, 1996 and denied rehearing (App. C at 43a) on September 11, 1996. Accordingly, this petition is filed within the

time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The opinions of the courts below catalog reprehensible conduct. The facts, as found by the district court, and sustained by the court of appeals, are as follows:

PHP Healthcare provided psychiatric services under a contract with the United States Army to Army personnel at Fort Hood, Texas. The project manager for this facility, *i.e.*, the most senior PHP Healthcare employee at the facility and its chief administrative officer, was Mark Kennedy.[1] Petitioner Donna Patterson was the chief nurse at the facility; Nicholas Brown served as a mental health technician.

Less than one month after PHP's Fort Hood facility had been opened, Kennedy met individually with each of his black employees to discuss a complaint that had been filed with the Equal Employment Opportunity Commission. Kennedy, who is white, warned his black employees that he would not tolerate any EEOC complaints filed against PHP Healthcare. After these meetings, Kennedy met with Ms. Patterson and said that "these stupid niggers have to understand that I carry a big stick." App. A at 3a.

Kennedy routinely referred to his black employees as "porch monkeys" and "niggers" and he specifically referred to petitioner Nicholas Brown in these terms. App. A at 3a-4a; App. B at 36a. Moreover, he stated that he considered blacks to be "shiftless" and "lazy." App. A at 4a. Kennedy scheduled black employees for the less desirable night shift and in other ways imposed his intense racial hatred on the black employees of PHP Healthcare. App. A at 3a. Whenever black employees were terminated or

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[1] Kennedy was named individually as a defendant in the district court.

left PHP Healthcare, Kennedy replaced them with white employees. App. A at 6a.

In March 1992, a meeting was held in which the black employees complained about being assigned to the less desirable night shift. After this meeting, Kennedy told Ms. Patterson that "not another nigger is to be hired." App. A at 3a; App. B at 37a. However in August 1992, Ms. Patterson hired another black mental health technician. Around the same time, she had contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions. App. A at 7a. On August 17, after returning from a meeting at corporate headquarters, Kennedy fired Ms. Patterson. Ms. Patterson's actions in contacting PHP Healthcare's headquarters and in hiring another black employee were the producing causes of her termination. *Id.*

Kennedy twice threatened to impose disciplinary action on Mr. Brown on the basis of memos and reports that Kennedy had falsified. As the district court found, PHP Healthcare discriminated against Mr. Brown by limiting his work schedule, assigning him certain menial duties that were not performed by white employees, denying him the opportunity for promotion, and by falsifying documents in order to take disciplinary action against him. App. A at 6a; App. B at 36a-37a. After Ms. Patterson was fired, her replacement as head nurse told Mr. Brown that she had no interest in hearing any complaints of black employees. App. A at 5a.

After suffering this unrelenting barrage of race discrimination and harassment for six months, on September 1, 1992, Mr. Brown submitted his resignation. Later that day, however, he participated in a conference call with Kennedy and PHP Healthcare's vice president for human resources. During this call, Mr. Brown was assured by the company's vice president that the work environment would change. In light of this assurance, Mr. Brown requested to withdraw his resignation. This

request was refused, however, as Kennedy told Mr. Brown that he was no longer needed and that his job had been filled. App. A at 5a.

Based upon this evidence, the district court (sitting without a jury) had no difficulty entering judgment against PHP Healthcare in Ms. Patterson's Title VII [2] claim and against PHP Healthcare and Kennedy jointly and severally in Mr. Brown's § 1981 claim. The court awarded equitable relief in the nature of reinstatement, back pay and attorney fees (App. B at 41a) and also awarded compensatory and punitive damages to Ms. Patterson and Mr. Brown. Specifically, the court awarded Ms. Patterson $150,000 in compensatory damages for "emotional damage[] and mental pain and suffering" and "[p]unitive damages in the amount of $150,000." App. D at 45a. The court awarded Mr. Brown $40,000 in compensatory damages and $150,000 in punitive damages. *Id.*

On PHP Healthcare's and Kennedy's appeal, the court below affirmed in part and reversed in part. After conducting a thorough review of the record, the court found "ample evidence supporting the district court's findings as to liability." App. A at 9a. So too, the court affirmed the district court's award of reinstatement and attorney fees. App. A at 12a; 33a. With respect to both compensatory and punitive damages, however, the court below reversed and vacated the district court's judgment.

Noting that Mr. Brown "presented no corroborating testimony nor . . . offer[ed any] medical or psychological evidence of damages," the court below vacated his $40,000 emotional distress award "with instructions for the district court to award nominal damages." App. A at 21a-22a. Concluding that "[h]urt feelings, anger and frustration are part of life," App. A at 22a, the court below discounted completely Mr. Brown's testimony concerning the emo-

[2] 42 U.S.C. § 2000e-5. Unless otherwise noted, all statutory references herein are to Title 42, United States Code.

tional trauma he suffered as a result of PHP Healthcare's and Kennedy's racism.[3]

Similarly, the court vacated Ms. Patterson's $150,000 emotional distress award. Notwithstanding her testimony that she was scarred by her termination and subsequent full year's unemployment, and that she endured severe family hardships when she had to leave her children to take work in other cities, App. A at 23a-24a, the court held that "th[e] record is void of sufficient evidence to support anything more than nominal damages . . .". App. A at 24a. Specifically, the court concluded that "Patterson's testimony alone" was not "competent evidence" to support an emotional distress award. *Id.*

So too, the court vacated the district court's punitive damage awards. The court vacated and remanded Mr.

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[3] Although not recited in the lower courts' opinions, Mr. Brown's testimony concerning his emotional injury was extensive. He testified about his anger upon learning that he had been referred to as a "porch monkey" (Tr. 415); his frustration and loss of trust caused by working for a person who hated him simply because of the color of his skin (Tr. 420); and his loss of self esteem and his feeling that he and his work had no value (*id.*). He further testified that the conditions he suffered at work caused friction at his home and affected his relationship with his wife and children (Tr. 422); and that being judged in the workplace simply on the basis of the color of his skin made him feel terrible: "[I]f I'm educated enough to give the proper care that I was giving to those patients, . . . why should I be judged by the color of my skin? We bleed the same, you know." Tr. 423. *See also* Tr. 447 (Mr. Brown describes "paranoia" lasting through the time of trial caused by his treatment at PHP Healthcare). In addition to taking this testimony, the trial judge was able to observe Mr. Brown's demeanor on the stand, including the fact that he was moved to tears as he recalled his experiences at PHP Healthcare. Tr. 448. Finally, the district court found that Mr. Brown had been constructively discharged from PHP Healthcare, a finding that, under Fifth Circuit precedent, required proof that "the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

Brown's $150,000 punitive damage award against Kennedy under § 1981 as excessive. App. A at 30a. Further, the court reversed outright both Mr. Brown's § 1981 and Ms. Patterson's Title VII (§ 1981a) punitive damage awards against PHP Healthcare, holding that because "Kennedy was not a corporate officer of PHP Healthcare," App. A at 30a, "his actions alone, without some evidence showing that PHP Healthcare knew or should have known of Kennedy's malicious or reckless conduct, are insufficient to cause punitive liability to directly attach to PHP Healthcare." App. A at 31a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the relief available to victims of unlawful discrimination and retaliation. In 1991, Congress enhanced Title VII, among other ways, by providing a damages remedy for victims of invidious discrimination. Since that time, the lower courts have been striving to define the dimensions of this damages remedy, sometimes in irreconcilably inconsistent ways. The court below held that uncorroborated testimony of the victim of discrimination or retaliation is not competent evidence to support an award of damages for emotional distress. This holding is demonstrably wrong as it flouts the teachings of this Court, conflicts with the decisions of the majority of circuits and is inconsistent with the Equal Employment Opportunity Commission's construction of Title VII. Similarly, the lower court's holding that punitive damages are awardable only upon evidence of malicious or reckless conduct by corporate officers conflicts with the decisions of virtually every other court that has considered this issue and is as well devoid of statutory support. Review by this Court is necessary to resolve the split in the circuits on these issues and to vacate the lower court's aberrant construction of our Nation's principal laws prohibiting workplace discrimination.

I. ONLY PREPONDERANT EVIDENCE OF ACTUAL INJURY IS NECESSARY TO SUPPORT AN AWARD OF DAMAGES FOR EMOTIONAL DISTRESS

1. The court below vacated the emotional distress damages award for both Mr. Brown and Ms. Patterson (with instructions for the district court to award nominal damages) because in its view the testimony of the victim of discrimination alone is not "competent evidence" to support such an award. App. A at 24a. Significantly, the court below did not simply reduce the damage awards as excessive; rather it held that because there was no evidence to corroborate the victims' testimony concerning their emotional distress, there was no competent evidence to support **any** emotional distress damage award beyond nominal damages.

In reaching this conclusion, the court relied on language from *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978); specifically, the court below focused on this Court's observation that emotional injury "may be evidenced by one's conduct and observed by others." *Id.* Apparently, the court concluded that because emotional injury "may be . . . observed by others," it may not be proved absent testimony from those observers.

The court below plainly erred in reading *Carey* as establishing a heightened evidentiary requirement to support an award of damages for emotional distress. *Carey* arose upon a record where "there is no proof of individualized injury to the plaintiff" and the question before the Court was whether substantial emotional distress damages could be awarded in the absence of **any** proof of actual emotional injury. 435 U.S. at 252-53. And, of course, the Court held that absent proof of actual injury, only nominal damages were available. 435 U.S. at 266. *See also Memphis Community School District v. Stachura*, 477 U.S. 299, 307-08 (1986) (summarizing *Carey* as

holding that "[w]here no injury was present, no 'compensatory' damages could be awarded.").

Thus, *Carey* provides no support for the heightened proof requirement imposed by the court below—that issue was neither presented nor decided. Indeed, far from imposing a heightened evidentiary requirement for proof of emotional injury, the Court recognized that such injuries are easily and routinely proved. *See Carey*, 435 U.S. at 263-64 (finding no reason to "presume" emotional injury in cases of unconstitutional deprivations because the Court could "foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused," and because "[d]istress is a personal injury familiar to the law.").

The court below required petitioners to prove their emotional injuries not just by preponderant evidence, but instead by preponderant evidence plus corroboration. In so doing it perverted this Court's holding in *Carey*; so too, it defied this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Specifically, in *Price Waterhouse*, this Court held:

> Conventional rules of civil litigation generally apply in Title VII cases, see, *e.g.*, *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that **parties to civil litigation need only prove their case by a preponderance of the evidence.**

490 U.S. at 253 (emphasis added). There is no dispute that petitioners presented preponderant evidence that they suffered actual injury as a result of their unlawful treatment. Indeed, as noted above, the court below sustained the district court's holding that Mr. Brown has been constructively discharged, a finding that necessarily required proof that "the employer made the employee's working conditions so intolerable that a reasonable employee

would feel compelled to resign." *Barrow v. New Orleans S.S. Ass'n,* 10 F.3d at 297. But this preponderant evidence was not good enough for the court below. Rather, because there was no corroborating evidence of petitioners' emotional injuries, their testimony was not even deemed competent.

As this Court held in *Price Waterhouse,* there is nothing so special about discrimination cases that requires courts to adopt new rules of decision. In civil litigation generally, proof, including proof of damages, need only be made by preponderant evidence. By imposing a heightened proof requirement on victims of discrimination, *i.e.,* by requiring them to prove their injuries by **corroborated** preponderant evidence, the court below has done precisely what *Price Waterhouse* and *Aikens* forbid.

Finally, although this case was tried without a jury, it is significant that the court of appeals' requirement of corroborating evidence to prove emotional injury conflicts with its own pattern jury instructions. Specifically, Fifth Circuit Pattern Jury Instruction No. 2-18 (West 1996) provides, in pertinent part:

> The testimony of a single witness may be sufficient to prove **any** fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

(Emphasis added). *See also* Devitt, Blackmar and Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 72.14 (West 1987) ("The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of **any** fact. . ."). The court below has carved out an exception to this instruction—"except for proof of emotional distress in civil rights cases"—an exception that is born of a perversion of *Carey* and defiance of *Price Waterhouse* and *Aikens.* Review by this Court is necessary to correct the important question

of federal law that the court below decided in conflict with applicable decisions of this Court.

2. The court below vacated petitioners' emotional distress damage awards because in its view no record evidence corroborated their testimony of emotional injury. *See* App. A at 21a-22a ("Brown presented no corroborating testimony nor did he offer expert medical or psychological evidence of damages caused by his alleged distress"); App. A at 24a (distress "**must be supported by competent evidence concerning the injury** [and] Patterson's testimony **alone** does not meet this threshold") (second emphasis added). Yet virtually every other circuit that has considered whether a victim's testimony alone may support an award for emotional injury has either held explicitly that such testimony may be sufficient to support an emotional distress award or has sustained a substantial award for emotional damages based solely on the victim's testimony. Accordingly, in requiring corroborating evidence to support anything beyond a nominal damage award, the court below has strayed from the other circuits. Review by this Court is necessary to resolve this split in the circuits and to conform the Fifth Circuit's view to the proper and predominant interpretation of the law.

At least three circuits have explicitly held that corroboration is not necessary to prove emotional distress. In *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272-73 (8th Cir. 1981), the Eighth Circuit confronted the question of emotional distress damages in a § 1981 employment discrimination case. In reversing the district court's failure to award damages for emotional distress, the court noted:

> We have held that the plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress.

Id., 660 F.2d at 1273.

Similarly, in *United States v. Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993), the Seventh Circuit dealt with a housing discrimination case in which "[a]ll of the evidence of emotional distress came from the testers' own testimony . . . [without] corroboration from any source." In specifically rejecting the argument that the evidence of emotional distress was insufficient, the court held:

> [W]hen the injured party provides the sole evidence, he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements. This is not to say, however, that an injured person's testimony can never be sufficient by itself, or in conjunction with the circumstances of the particular case, to establish damages for emotional distress.

Id., 981 F.2d at 931-32 (internal quotations and citations omitted).

Most recently, the Fourth Circuit addressed this question in *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996), a race discrimination case under § 1983. After surveying the applicable circuit authority, the court held:

> [W]e conclude that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation . . .

Id., 93 F.3d at 1254.

In the Third Circuit, the question of the necessity of corroborating evidence to support an award for emotional distress has explicitly been left open. In *Spence v. Board of Educ. of Christina School District*, 806 F.2d 1198, 1200-01 (3d Cir. 1986), the court addressed the adequacy of evidence to support an emotional damage award under § 1983. In sustaining the district court's refusal to award compensatory damages, the court held:

> We need not decide whether a verdict for emotional distress may ever be supported solely by a plaintiff's own testimony.

Id., 806 F.2d at 1200-01 (citations omitted). However in *Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 F.3d 29 (3d Cir. 1994), the court rejected the notion, adopted by the court below, that *Carey* creates a heightened evidentiary standard for proof of emotional injury:

> *Carey*'s requirement that actual injury be proven before a plaintiff may recover serves merely to ensure that plaintiffs are not compensated for illusory injury. We must bear in mind that the civil rights laws are intended in part to provide broad, consistent recompense for violations of civil rights.

Id., 21 F.3d at 35. In specifically rejecting the argument that expert medical testimony was necessary to establish emotional injury, the court concluded that

> [i]n light of the purpose of the civil rights laws we have described, we see no reason to require that a specific type of evidence be introduced to demonstrate injury in the form of emotional distress.

Id., 21 F.3d at 36. Thus, while the Third Circuit has not squarely answered the question of whether corroborating evidence is necessary to support an emotional distress award, it has disavowed the notion that *Carey* creates a heightened evidentiary requirement for proof of emotional injury.

Almost without exception, the remainder of the circuits have at least implicitly rejected a requirement of corroborating evidence to prove emotional distress. The Second Circuit, for example, without any discussion of the question, sustained an award of emotional distress based solely on the victim's testimony. *See Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) (sustaining award for emotional distress in

housing discrimination case). Similarly, in *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994), the Sixth Circuit sustained an award for emotional injury in a § 1983 case that was predicated solely upon the plaintiff's testimony. *See also DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992) (sustaining emotional distress verdict based solely on the victim's testimony); *Secretary, Department of Housing and Urban Development v. Blackwell*, 908 F.2d 864, 872-73 (11th Cir. 1990) (same); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (same).

Of all the circuits, apparently only the Tenth joins the court below in holding that corroborating evidence is necessary to prove emotional injury in civil rights cases. In *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 420 (1995), the court sustained the trial court's refusal to let damages go to the jury. The court held:

> Testimony by a plaintiff, and by one close to him or her, of emotional distress, supported by inferences readily drawn from the facts surrounding and following from the denial of procedural due process are sufficient to support an award of damages. Here, Koopman offered no witness to corroborate his testimony as to his mental state.

Id., 41 F.3d at 1420.

These cases show that the lower courts are in disarray with respect to the necessity of providing corroborating evidence to sustain an award of damages for emotional injury in civil rights cases. The Fourth, Seventh and Eighth Circuits have all explicitly held that corroborating evidence is **not** necessary, while the court below and the Tenth Circuit have held that it is. Many other circuits have implicitly held that the victim's testimony alone may be sufficient, but the Third Circuit has expressly left this question open. Review by this Court is necessary to resolve this split in the circuits and decide finally this important question of federal law.

3. The court below intimated that its direction for awards of nominal damages to petitioners was consistent with the Equal Employment Opportunity Commission's interpretation of the Civil Rights Act of 1991. App. A at 20a; 24a. While the court below was correct to defer to the EEOC's interpretation of the 1991 amendments, *Equal Employment Opportunity Commission v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988), it wholly misconceived the letter and intent of the EEOC's pronouncements concerning nonpecuniary damages. Review by this Court is necessary to conform the decision below with the EEOC's guidance and to accord the EEOC the primacy in interpreting Title VII to which it is entitled.

First, neither the EEOC's policy guidance nor its published decisions supports the lower court's conclusion that a victim's testimony alone is insufficient to support an award for emotional distress. Specifically, in its "Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act," 8 Fair Emp. Prac. Manual § 405:7091, 7097 (Jul. 7, 1992), the EEOC explicitly adopted the Eighth Circuit's holding that "[t]he plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress" (*citing Williams v. Trans World Airlines,* 660 F.2d at 1273) (internal quotations omitted). Further, as an example, the EEOC cited *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992-93 (8th Cir. 1984), a case where the court sustained a $52,644.80 emotional distress award based solely on the plaintiff's testimony of emotional injury.

Similarly, in its role as administrative adjudicator of federal employees' discrimination claims, the EEOC has held that a plaintiff's testimony, standing alone, may be sufficient to support an award for emotional injury:

> Finally, the Commission disagrees with the agency's suggestion that appellant should have provided statements from "objective third party witnesses" to sup-

> port his claim for damages. Appellant's claims for damages for loss of consortium or loss of enjoyment of family relationships may be outside the realm of third party observation.

Carpenter v. Glickman, 95 FEOR 3229 at XII 146 (EEOC 1995). Accordingly, to the extent that the court below believed its decision comported with the administrative construction of the EEOC, it was wrong.

Also in the name of the EEOC's policy statement, the court below assailed petitioners' proof of emotional injury because neither Mr. Brown nor Ms. Patterson presented evidence of any physical manifestations of the emotional harm they suffered.[4] *See* App. A at 20a ("The EEOC, as the primary enforcement mechanism against discrimination under Title VII, . . . [has] interpreted the 1991 Amendments allowing compensatory damages under Title VII to . . . require physical manifestations to recover for emotional harm."). Thus, not only did the court below require petitioners to present corroborating evidence of their emotional injury, it specifically required corroboration in the form of evidence of physical manifestations of emotional harm.

A requirement for proof of physical manifestations of emotional harm as a prerequisite for recovery, however, is nowhere to be found in the EEOC policy statement or in

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[4] While the court held that Mr. Brown did not testify "as to any manifestations of harm listed by the EEOC policy statement," App. A at 21a, and that as to Ms. Patterson "[t]he record contains none of the listed evidentiary factors in the EEOC policy statement," App. A at 24a, the court could only have been referring to the **physical manifestations** discussed in the policy statement. The record is replete with evidence that petitioners suffered emotional harm of the nature discussed by the EEOC. *See, e.g.,* Tr. 420 (Mr. Brown's testimony concerning his loss of self esteem); Tr. 422 (Mr. Brown's testimony concerning marital and familial strain); Tr. 97 (Ms. Patterson's testimony concerning her sleeplessness); Tr. 100-01 (Ms. Patterson's testimony concerning her marital and familial strain).

any circuit law. While the EEOC policy statement does state that "[t]he Commission will typically require medical evidence of emotional harm to seek damages for such harm **in conciliation negotiations**", 8 Fair Emp. Prac. Manual at 405:7097 (emphasis added), the policy statement hardly stands for the proposition that medical evidence is a prerequisite to recovery. To the contrary, the policy statement cites several circuit decisions in which emotional distress damages were awarded in the absence of medical evidence. *See, e.g., Cowan v. Prudential Ins. Co.*, 852 F.2d 688, 690-91 (2d Cir. 1988) (sustaining $15,000 emotional distress award on evidence of loss of self esteem and marital problems); *Muldrew v. Anheuser-Busch*, 728 F.2d at 992-93 (sustaining award in excess of $50,000 without medical evidence). *See also Miner v. City of Glens Falls*, 999 F.2d 655, 663 (2d Cir. 1993) (medical testimony is "neither required nor necessarily probative" in establishing emotional injury); *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991) ("No evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted"); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993) ("Medical evidence concerning physical symptoms is not required" to prove emotional injury); *Bolden v. Southeastern Pennsylvania Transp. Authority*, 21 F.3d at 36 (medical evidence not required); *Carter v. Duncan-Huggins*, 727 F.2d at 1238 (plaintiff's testimony that she "felt isolated" and worked in an atmosphere of harassment "constitute[s] the stuff of which a claim for humiliation and emotional harm is composed.").

Title VII now includes a compensatory damages remedy for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1491 (1994). The EEOC has recognized that nothing in the statute suggests that this remedy is only available upon presentation of corroborating evidence of emotional

injury or evidence of physical manifestations of emotional harm. Yet in the name of deference to the EEOC, the court below vacated petitioners' emotional distress awards precisely on these grounds. Review by this Court is necessary to correct the lower court's erroneous construction of the EEOC's position on this matter and to give proper deference to the EEOC as the principal federal agency responsible for implementing Title VII.

4. The decision below is extraordinary, and extraordinarily wrong. In virtual isolation from its sister circuits, the court held that the victims' testimony concerning their emotional injuries was not "competent evidence" to support an emotional distress award. Similarly, the court below achieved lone eminence among the circuits when it held that proof of physical manifestations of emotional injury is necessary to support an award of damages for "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life." § 1981a(b)(3). The significance of the decision below cannot be overstated: the court below did not simply vacate and remand the emotional injury awards as excessive; it held that absent corroborating evidence, or specific testimony concerning physical manifestations of emotional injury, a victim of discrimination is entitled only to nominal damages for the injury he or she suffered.

In imposing this heightened proof requirement upon victims of invidious discrimination, the court below has defied the teachings of this Court, isolated itself from the other circuits and ignored the EEOC's interpretation of the Civil Rights Act of 1991. Most significantly, however, by crafting a heightened evidentiary requirement for proof of emotional injury, the court below has done violence to the civil rights acts themselves. Regrettably, as this case demonstrates, for some people "[h]urt feelings, anger and frustration" caused by being referred to as a "nigger" and "porch monkey" and being subjected to a supervisor's bigotry remain "part of life." App. A at 22a. *See also*

N.Y. Times, Nov. 4, 1996, § A, at 1, col. 1 and § D, at 4, col. 6 (Texaco officials referring to black employees as "niggers," "orangutans," and "porch monkeys"). But it is precisely this "insidious and pervasive evil" that Congress has sought to eliminate through its passage of the civil rights laws. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). By ratcheting up evidentiary standards for victims of discrimination, the court below has simply created another impediment to eradication of an evil that continues to plague our nation to this day. Review by this Court is necessary to remove this impediment and allow Congress' efforts to have their full effect.

II. PUNITIVE DAMAGES ARE AVAILABLE AGAINST A CORPORATE EMPLOYER WITHOUT PROOF THAT OFFICERS OF THE COMPANY ACTED MALICIOUSLY

1. The court below vacated Mr. Brown's punitive damage award against Kennedy as excessive [5] and reversed outright both Mr. Brown's and Ms. Patterson's punitive damage awards against PHP Healthcare. App. A at 32a. Reasoning that "Kennedy was not a corporate officer of PHP Healthcare," App. A at 30a, and that "[t]he record is completely void of evidence showing that PHP Healthcare took part in any discriminatory conduct much less

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[5] The court held that the $150,000 punitive damage award against Kennedy was excessive in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996). Kennedy's conduct is at the extreme end of the reprehensibility scale, and, significantly, the $150,000 award is well below the statutory cap authorized under § 1981a(b)(3)(D). While obviously Congress did not intend the Title VII caps to limit damage awards under § 1981, certainly a § 1981 award that is beneath the applicable Title VII cap is reasonable. *See* Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act, 8 Fair Emp. Prac. Manual at 405:7101 n.18 (because "[t]he sum of punitive damages, future pecuniary losses and nonpecuniary losses may not exceed the damage caps set forth in § 1981a(b)(3)[,] . . . punitive damage awards under § 1981a typically will not be 'grossly excessive' or 'shocking.'").

any 'malicious' or 'reckless' conduct," the court exonerated PHP Healthcare from any liability for punitive damages. App. A at 31a.

By requiring proof of malicious or reckless conduct of corporate officials, the court below has again distanced itself from the teachings of this Court and the law of its sister circuits. Review by this Court is necessary to conform the court below to the law universally applied in the other federal circuits.

In *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-93 (1982), this Court suggested that agency principles, and particularly *respondeat superior*, were appropriate doctrines to be applied in § 1981 cases. *See also id.*, 458 U.S. at 404 (O'Connor, J., concurring) ("nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*."). Similarly, the circuit courts have unanimously adopted agency principles in fixing liability, including liability for punitive damages, under § 1981. *See, e.g., Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989) (sustaining imposition of punitive damage liability under *respondeat superior* in § 1981 case); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (sustaining award of punitive damages under *respondeat superior* in § 1981 case).

Under general principles of agency law, a corporate employer is vicariously liable for punitive damages brought about by the conduct of a managerial employee:

> In addition to liability arising from ratification and authorization, punitive damages also may be imposed, in the absence of proof of fault on the part of the corporation, when the wrongful actor is a managerial employee.

Mitchell v. Keith, 752 F.2d 385, 389 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985). In *Fitzgerald v. Moun-*

tain States Tel. & Tel. Co., 68 F.3d 1257, 1263 (10th Cir. 1995), the Tenth Circuit addressed the question of when punitive damages may be assessed against a corporation based on conduct of an employee. Citing to the *Restatement of Torts (Second)*, § 909 (1979), the court noted:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if, but only if, . . .
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment . . .

Id. 68 F.3d at 1263.

There is no dispute that Kennedy was employed in a managerial capacity by PHP Healthcare: as the project manager of the Fort Hood facility, he was the most senior PHP Healthcare employee at the facility and its chief administrative officer. Indeed, the court below held that "Kennedy's actions may be attributed to PHP Healthcare for purposes of compensatory damages, given his supervisory role as project manager." App. A at 30a. *See also Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1375-76 (9th Cir. 1990), *vacated on other grounds*, 501 U.S. 1201 (1991) (multistate corporation's "General Manager, the highest ranking corporate officer in Portland," was a managerial agent for purposes of vicarious imposition of punitive damages).

Notwithstanding Kennedy's status as a managerial agent, the court below refused to hold PHP Healthcare vicariously liable for his malicious and reckless conduct. Rather, it required proof that PHP Healthcare "took part in [the] discriminatory conduct" or "knew or should have known of Kennedy's malicious or reckless conduct." App. A at 31a.[6]

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[6] The court below concluded that "there is nothing in the record which would show that PHP Healthcare had knowledge of Kennedy's malicious or reckless conduct, or authorized, ratified or ap-

In so holding, the court below has adopted a rule explicitly rejected by several circuits and implicitly rejected by others. Most directly, the Eighth Circuit in *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1246 (8th Cir. 1983), rejected the corporate defendant's argument that it is "not appropriate to award punitive damages against a corporate defendant in the absence of evidence that the executive decision makers were racially motivated or biased." (Internal quotations omitted). Similarly, the Seventh Circuit in *Hunter v. Allis-Chalmers Corp.* held:

> [T]he deliberate act of [a managerial agent] is the corporation's deliberate act. Whether **his** superiors knew or should have known what he did is irrelevant.

797 F.2d at 1422 (emphasis original) (citation omitted).[7]

Several circuits have upheld the imposition of punitive damages against a corporate defendant under § 1981 merely upon proof that the wrongful actor was a supervisory employee, not a managerial employee. For example, in *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1260 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986), the Sixth Circuit sustained an award of punitive damages under § 1981 based solely on the conduct of supervisors without any discussion at all whether

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proved Kennedy's actions." App. A at 31a. However the district court found (and the court below recognized) that Ms. Patterson "contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions" and that "Patterson's actions in contacting PHP Healthcare's headquarters . . . [was a] producing cause[] of her termination." App. B at 37a; App. at 7a.

[7] The closest support among the other circuits for the Fifth Circuit's rule is found in *Hamilton v. Svatik*, 779 F.2d 383, 389 (7th Cir. 1985), in which the court held that "[a] principal is liable for punitive damages for the discriminatory acts of her agent only if she knew of or ratified the acts." *See also Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1100 (7th Cir. 1992) (following *Hamilton*). These cases are both housing discrimination cases, however, where the issue of "managerial agents" did not arise.

corporate officers of Chrysler were aware of or participated in the unlawful conduct. Similarly, in *Equal Employment Opportunity Commission v. Gaddis,* 733 F.2d 1373, 1380 (10th Cir. 1984), the Tenth Circuit sustained an award of punitive damages against the corporate defendant, holding that

> [a]n employer is liable under both Title VII and section 1981 "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote . . ."

(Citation omitted). In *Rowlett v. Anheuser-Busch, Inc.,* 832 F.2d 194, 205-07 (1st Cir. 1987), a case cited in both the EEOC policy statement and the House Report accompanying the 1991 Civil Rights Act,[8] the court sustained the imposition of punitive damages against the corporate defendant on the basis of conduct by a supervisor and without any proof or discussion that corporate officers knew of or participated in the unlawful conduct.

By excising the "managerial agent" component from the agency law of vicarious liability for punitive damages, the court below has separated itself from the other circuits. Had this case arisen in any of several other federal circuits, Kennedy's status as a supervisory and managerial agent of PHP Healthcare would have been sufficient to hold PHP Healthcare vicariously liable for Kennedy's reprehensible conduct. Review by this Court is necessary to assure a uniform interpretation of the law of punitive damages under § 1981 throughout all the circuits.

2. The court below recognized that agency principles required PHP Healthcare to answer for Kennedy's unlawful conduct. *See* App. A at 30a ("We agree that Kennedy's actions may be attributed to PHP Healthcare *for purposes of compensatory damages,* given his supervisory role as project manager") (emphasis added). Nonetheless,

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[8] *See* H. Rep. No. 102-40(I), 102nd Cong., 1st Sess. (1991) *reprinted in* 1991 U.S.C.C.A.N. 549 at 612.

both with respect to § 1981 and Title VII, the court held that something more needed to be proven to attach liability for punitive damages to PHP Healthcare; *i.e.*, proof of malicious or reckless conduct of corporate officers. App. A at 31a.

As noted above, the circuit courts (other than the court below) have held that malicious or reckless conduct of a supervisor or manager is sufficient to attach punitive damage liability to a corporate defendant under § 1981. Although more limited, the existing case law under Title VII shows that not even this proof is necessary: if an individual's acts are sufficiently acts of the "employer" for purposes of imposing liability under Title VII, then the employer is liable for any damages that may be awarded. Nothing in the language of § 1981 suggests that Congress intended to create different standards of vicarious liability for compensatory and punitive damages. By creating this distinction, the court below has improperly limited the reach of the punitive damage amendments to Title VII. Review by this Court is necessary to address this significant question of federal law and correct the decision of the court below.

In addition to the traditional Title VII remedies available under § 2000e-5(g), § 1981a(a)(1) provides that a "complaining party may recover compensatory and punitive damages." Yet the only additional requirement imposed by the statute for an award of punitive damages is proof of "malice or reckless indifference to the federally protected right." § 1981a(b). The court below expressly found this evidence of malice in Kennedy's conduct, App. A at 28a, and thus all statutory elements for entitlement to an award of punitive damages are present. The court below could deny relief only by engrafting onto the statute a requirement that Congress did not enact; *i.e.*, by writing into the statute a requirement for proof of malice at the corporate level. In so doing, the court

below strayed well outside its proper judicial role and impermissibly invaded Congress' exclusive domain.

Section 1981a was enacted against Title VII's well-understood framework of employer liability:

> [I]f [an individual] serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment[,] . . . the individual operates as the alter ego of the employer, and the employer is liable for the unlawful practices of the individual without regard to whether the employer knew of the individual's conduct.

Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (internal quotations omitted), *citing Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *aff'd in pertinent part*, 900 F.2d 27 (4th Cir. 1990) (en banc). *See also Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (per Posner, J.) ("[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through its agents."). There is no hint in the statutory language, or its legislative history, that Congress intended to modify this bedrock principle of employer liability in enacting the punitive damage provisions of § 1981a.

Almost without exception, the courts that have considered punitive damages under Title VII have followed this model of employer liability and assessed punitive damages without requiring proof of corporate officers' complicity. For example, in *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1347 and 1356 (7th Cir. 1995), the court held the corporate employer liable for punitive damages on the basis of conduct of a mid-level supervisor. Similarly, in *Preston v. Income Producing Management, Inc.*, 871 F. Supp. 411, 415 (D. Kan. 1994), the court rejected the argument that malicious conduct of corporate officers was required:

> It should be sufficient here to say that the price paid by a defendant for its conduct as an employer, through its store managers, is punitive damages.

Moreover, in *Woodyatt v. Bethlehem Steel Corp.*, 1996 U.S. Dist. LEXIS 12974 at *5 (E.D. Pa. Aug. 28, 1996), the court assessed punitive damages under Title VII specifically on the basis of subordinate managers' malice:

> It is not necessary, as Defendant argues, for the ultimate decision maker to have acted with an evil intent. [The decision maker] made his decision based on the opinion of the supervisors, and the evidence . . . supports a finding that at least two of the supervisors acted with malice or reckless indifference.

See also Hearn v. General Electric Co., 927 F. Supp. 1486, 1501 (M.D. Ala. 1996) (imposing punitive damage liability on basis of plant manager's malicious conduct); *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309, 1316 (W.D. Mo. 1995) (malicious conduct of supervisors resulted in punitive damage liability for corporation).

Only the Eleventh Circuit has joined the court below in finding this additional requirement of corporate-level malice. Specifically, in *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996), the court refused to award punitive damages in a sexual harassment case:

> [W]e also decline to hold that, in the instant circumstances, the state of mind of the harassing employees counts as the state of mind of Shoney's, the corporate employer, for punitive damages purposes.

Significantly, *Splunge* cited the decision of the court below as its principal authority. *Id.*

While *Splunge* is presumably limited to hostile work environment cases, nonetheless it shows that the aberrant construction of § 1981a adopted by the court below has gained currency in at least one other court. Several district courts, as well as the Seventh Circuit, have recog-

nized that punitive damages may be appropriate even without evidence of corporate officers' complicity. Review by this Court is necessary to resolve this split among the lower courts on this significant question concerning the availability of punitive damages under Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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